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IN THE
Supreme Court of the United States

October Term, 1963

No. 449

A Quantity of Copies of Books, HAROLD THOMPSON
and ROBERT THOMPSON, dba P-K NEWS SERVICE,

Appellants.

vs.

STATE OF KANSAS,

Appellee.

On Appeal From the Supreme Court of the
State of Kansas.

REPLY BRIEF FOR THE APPELLANTS.

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REPLY BRIEF FOR THE APPELLANTS.

Statement.

1. The appellee concedes in the opening statement of its brief (p. 5) that appellants did present evidence through witnesses demonstrating that the books here in question do not exceed customary limits of candor in description of sex. The appellee discounts this uncontradicted testimony with the following statement:

"Intervenors did not present their witnesses as average members of the community. *Three of their four witnesses held graduate degrees*". Appellee's Brief, 5 (emphasis added).

There is, of course, more involved in the aforesaid statement than the mere attempt to diminish the effect

of the witness' testimony. Appellee appears unconcerned with the question of what is actually going on in the community, what society in fact tolerates in the depiction and representation of sex in books, newspapers, magazines, motion pictures, television and other related media of communication. Appellee would reduce the objective test of "contemporary community standards" to the subjective attitudes of the hypothetical "average man". However, the effect of the reading of a book on the average person is one issue. The question whether the book substantially exceeds societal limits of candor in description or representation of sex is a separate matter which as a matter of fact can hardly be answered by, or be dependent upon, the judgment of a theoretical "average member of the community".

2. The appellee makes no real attempt to justify the statutory test for obscenity, nor the test, approved on appeal, employed by the District Court [R. 17-18], nor the varied tests referred to by the court below [R. 40-41]. Instead, the appellee reminds this Court in its brief that whatever definition of obscenity is enunciated, "in substance" these enunciations "amount to the same thing". The essential test, according to appellee, is this; does the material deal with sex in a manner offensive to generally accepted standards of decency?

Appellee's Brief, 5.

Plainly, the case herein, it is submitted, must be decided in the first place on the record made below. The District Court used the following operative standard for judging the alleged obscenity of the writings involved herein: "If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires," and the Court further be-

lieved that they would have this effect, then they are not entitled to the protection of the Amendment to the Constitution" [R. 17-18] (emphasis added). The appellee has made no attempt to support this standard for judging obscenity within the purview of First Amendment guarantees. See, Appellants' Brief 43-45.

Moreover, aside from the fact that appellee's improvised standard for judging obscenity, newly presented, omits all requirements relative to the corruptive effect of the material, it is not apparent, it is submitted, how the new standard is consistent with First Amendment requirements. "Indecency", standing alone, is clearly too broad and vague a term to make a valid censorship standard. "Indecent" may include anything from vulgarity or impropriety or unseemliness to unfitness or unbecomingness or indecorum. Such exquisite vagueness as appellee proposes for judging what the public shall or shall not read is clearly not a permissible standard in the area of free expression under the Constitution.

3. The appellee asserts that the books herein "constitute hard-core pornography". Appellee's Brief, 6. The appellee was not so firm in this opinion in its Motion to Dismiss the appeal herein. In the Motion to Dismiss, appellee stated that each of the books "may be classified as pornography, or at least bordering on pornography" (pp. 8-9) (emphasis added). The District Court did not place such appellation on the writings, asserting only that the "core" of the books "would seem to be that of sex, with the plot, if any, being subservient thereto" [R. 39]. It is true that the court below was of the opinion that the books were "hard core pornography" and that "young G.I.'s from Fort Riley

—many of whom frequent Junction City—would be of the same opinion” [R. 41], but the court gave no indication of the standards to be used in judging so-called hard core pornography, and, indeed, contented itself with calling the books “obscene by the definition found in the Roth case, or by the definition found in the statute or by any other definition” [R. 41]. This “talismanic” approach to the books involved herein is clearly not in itself a valid reason, it is submitted, for denying the writings constitutional protection. See, *New York Times and Abernathy v. Sullivan*, October Term 1963, Nos. 39 and 40, opinion rendered March 9, 1964.

Because of the nature of appellee’s agitational argument on this issue, appellants discuss the question in more detail hereafter. It should be noted however that while appellee maintains the books herein have all the “attributes found in such pornography”, still one of the so-called attributes appears missing—“some of the four-letter words” are lacking in the writings. Appellee’s Brief 6. What appellee is really conceding is that the books herein do not even contain the racy language found in numerous comparable books dealing with sex and now customarily found and accepted in contemporary literature.

Appellee also insists that these paperback books have a standardized format, from which appellee infers that they are “part of a mass-production industry, which has repackaged hard-core pornography and aimed it at a new and larger market”. Appellee’s Brief 6. What appellee is really admitting is that the books herein are not distributed nor sold clandestinely, and that appellee believes the circulation of the press under commercial auspices, especially a large portion of the paperback

industry, is equivalent to "the business of smut peddling" (Appellee's Br. 6). As appellants demonstrate hereafter, there is hardly any publisher or national distributor of writings dealing with sex who can hope to escape the supercharged name calling which appellee heaps upon the books herein.

4. Comparing an obscenity proceeding to a negligence case, appellee states that in both situations "a hypothetical man is used as the norm"; that this norm is "the man with average community attitudes"; that the trier of fact, as in negligence cases, "constructs the norm using the totality of his experience", from which it follows, that the trier of fact must be deemed in law to know what are the contemporary community standards in the depiction and representation of sex, and therefore "the state cannot be required to produce it" because evidence with respect to the question of whether writings substantially exceed limits of candor "is really in the nature of argument". Appellee's Brief, 6-7.

If appellants understand appellee's unusual construction accurately, it would appear that in any obscenity prosecution the only burden placed upon the State is to offer the writing in evidence. If this is all that is meant by requiring the State, before suppressing and burning a book, to prove that the book substantially exceeds contemporary community standards in depiction and representation of sex, then the "vigor" and "variety" of discussion of the problems of sex will clearly be damped. See, *New York Times and Abernathy v. Sullivan*, October Term, Nos. 39 and 40, opinion rendered March 9, 1964.

The trier of fact in a negligence case may perhaps construct the "norm" of a "reasonably prudent man", but the trier is hardly prepared to render a valid judgment without proof of the essential elements of negligence. So, too, it may perhaps be possible for the trier of fact in obscenity proceedings to construct the "norm" of a "person with average sex instincts" (*United States v. One Book Called "Ulysses"*, 5 F. Supp. 183, D.C. N.Y. 182, 184, 1933), but the trier of fact cannot possibly know, without proof, whether the printed words in the book before him substantially exceed in description and representation of sex the candor expressed in all the writings and other media of communication freely circulated in the community. Clearly, the trier of fact must have *some proof* before the trier can render a rational judgment devoid of his own subjective predilections. The issue is not whether the trier of fact is "bound" to believe the proof adduced on the question of contemporary community standards; the real issue is whether the constitutional guarantees require that a book ~~be not~~ suppressed until the State proves by evidence and with convincing clarity that the writing substantially exceeds customary limits of candor in depiction or representation of sex. If no such proof is required, the distribution of all books dealing with sex will become a risky venture.

5. The appellee has also devised for the first time a new conception of the word "community" as used in the test for judging the obscenity of writings. It appears, according to appellee, that the word has no geographical connotations, but merely represents "an average of all the attitudes known by the trier to obtain in society at large". We are assured by appellee, that

"Roth, the Kansas statute, and the courts below" all employed the word "community" as the appellee now envisages it, "to denote not a geographical entity but an average of all the attitudes within the trier's experience". Appellee's Brief, 7.

As a result of the aforesaid, appellee insists that appellants have misstated the record in asserting that the trial judge applied the standards of Junction City, Kansas, but as appellants show hereafter it is the appellee who overlooks the record and there can be no question that the District Court made its decision on the basis of the said geographical entity. Indeed, the appellee has seemingly forgotten that in its Motion to Dismiss the appeal, appellee made the following statement: "The U. S. Supreme Court in *Manual v. Day* [370 U.S. 478], concludes the relevant 'community' under a federal statute is the nation. It seems reasonable to assume that the 'community' under a state statute would be the state." Motion to Dismiss, 9, n. 2. Appellee has therefore previously equated "community" with a geographical entity, and in *Manual*, Mr. Justice Harlan noted that constitutional problems might arise if a "lesser geographical framework" than a national standard were employed for judging obscenity under the federal statute. 370 U. S., at 488. See, Appellants' Brief, 50-54.

6. The appellee, in accordance with its view that no proof is required in an obscenity proceeding to show the extent of public acceptance, maintains that the decision maker in such cases may equally be a judge or a jury. Appellee has not sought to meet the fundamental constitutional issues presented on this aspect of the appeal. Appellants' Brief, 24-40. Since appellants ana-

lyze appellee's argument on this issue hereafter in the brief, it suffices at this point to note on appellee's own terms, that if under the Constitution a writing may not be suppressed unless it substantially exceeds "the various attitudes, current in the community" (Appellee's Brief, 7), then clearly it is arbitrary to deprive the representatives of the community from making the decision which so vitally affects the community.

7. The appellee asserts that "the Kansas statute is not a licensing or censorship scheme" because the seizure here was effected only after publication, and it was "designed to restrain further publication of the same material". Appellee's Brief, 7. But books illegally suppressed after their publication are as much the subject of constitutional protection, it is submitted, as those which are not permitted to leave the printing presses. *Lovell v. City of Griffin*, 303 U. S. 444, 452.

The appellee justifies the issuance of the search warrant by urging that the District Court scrutinized seven titles before him, and "concluding that these were probably obscene, he was inescapably drawn to the conclusion that the 'other Nighstand books' with virtually identical titles, named in the back of these seven, were exactly the same in nature". Appellee's Brief, 8. The failure of the appellee to concede the unlawfulness of such censorial activities by judicial decree gives concern as to the meaning which appellee ascribes to the terms "order, morality, and human dignity" appearing in its brief. Appellee's Brief, 10. Is it obscenity, or is it really unbridled, arbitrary and lawless censorship which "makes a frontal assault" on the foundations of order, morality, and human dignity?

Finally, appellee urges that the total delay from seizure to final decision "was sixteen days", which appellee maintains is "not excessive" when applied to material "claimed to have lasting, not periodical, value." Appellee's Brief, 8. It is true that sixteen days of suppression is not as long as sixteen hundred days of suppression, but it is suppression just the same. If the suppression is illegal, one moment of such suppression is too long. The validity of constitutional principles, it is submitted, should not be measured on a time basis.

I.

The Failure to Provide a Jury Trial for Determination of the Issue of Obscenity Renders the Statute Unconstitutional. Appellee's Arguments Fail to Meet the Constitutional Issues Involved (Appellee's Brief, 20-22).

The appellee avoids any discussion of the historical and legal material presented in Appellants' Brief, pp. 24-40. The fact is that appellee treats the question here as if no First Amendment issues were involved. As is evident from its entire brief, appellee assumes that since "obscenity" is purportedly outside the protection of the First Amendment guarantees, it follows that none of the questions here presented involve First Amendment guarantees. That, however, it is submitted, is placing the cart before the horse.

The question presented at this point of the discussion is this: Assuming it is attempted to suppress a writing as obscene, is the State constitutionally required to provide a jury trial for the determination of the question? In such posture of the proceedings, we deal only with a writing ordinarily protected from suppression by the provisions of the First Amendment. The writing

has not yet been found to be obscene; it still has the protection of all the constitutional guarantees; and the problem is who shall make the decision that it has no such protection. Thus, unlike similar issues involving adulterated food or gambling paraphernalia, First Amendment questions are involved when it is sought to suppress an alleged obscene book, without a jury determination.

Appellee sidesteps all questions of history (Appellants' Brief, 27-33) and the significance of the *Roth-Alberts* definition of obscenity with its inclusion of "contemporary community standards" (Appellants' Brief, 33-37). Refusing to meet the constitutional issues, appellee limits itself to a discussion of "policy." It is argued first that neither a judge nor jury may decide the issue of obscenity by their own "personal opinions." What the judge or jury must apply is their "knowledge of community attitudes," and since the judge "lives in the community, just as the jurors do," the judge knows "the attitudes of society at large as well as they do." It is urged that judges may even be more circumspect than juries in deciding whether a given book is obscene, reliance being placed on an article in the Harvard Law Review entitled *The Passive Virtues*. Appellee's Brief, 20-21.

With deference, it is submitted that the "mechanical jurisprudence" represented by the doctrine of "passivism" (Address, Walter E. Craig, Los Angeles Daily Journal, March 19, 1964, p. 5) is not applicable here. The provisions of the fundamental law are to be applied in the light of "the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." *United States v. Classic*, 313 U. S. 299, 316.

It is therefore not sufficient to assert that the judge knows as much as the jurors do about community "attitudes." It is probable that most sociologists would agree with Professor Chafee that judges do not. Appellants' Brief, 37-38. But far more important is that our entire history shows the jury to have been a "barrier" against attempts by government-judicial as well as legislative and executive—to suppress the circulation of press and speech. The reason why a jury trial is required in obscenity proceedings is because history and the tenets of our constitutional system support such a position.

Moreover, it appears unduly arbitrary on the one hand to attempt to tighten obscenity standards by requiring that no writing be suppressed which the community tolerates, and at the same time withdrawing the right from the community through its representatives to make the awesome decision of final suppression of a communication.

The appellee argues that the jury trial guarantees of the Sixth and Seventh Amendments are not incorporated in the Fourteenth Amendment (Appellee's Brief, 21) and points to the decisions in *Chicago, R.I.&P.Ry. Co. v. Cole*, 251 U.S. 54 and *Fay v. New York*, 332 U. S. 261. The *Chicago, R.I.&P. Ry. Co.* case involved a negligence suit and the *Fay* case involved the constitutionality of a "blue ribbon" jury in a criminal action involving officials of a labor union. No First Amendment questions were presented in these cases. Whatever may be the ultimate decision by this Court on a squarely presented question of the incorporation of the jury guarantees of the Sixth and Seventh Amendments into the due process provisions of the Four-

teenth Amendment, the fact is that we deal here with a situation where the question of a right to trial by jury is inextricably entwined with the protective provisions of the First Amendment, and on that question appellee has made no answer.

Appellee finally urges that "community toleration is a *constitutional standard*," and that since judges in appellate courts may ultimately decide that a writing is constitutionally protected, it follows that a judge is as competent as a jury to decide whether a book exceeds contemporary community standards, from which it follows that a jury in obscenity proceedings is not *constitutionally required*. Appellee's Brief, 21-22.

Whether a writing exceeds customary limits of candor in description and representation of sex is a factual matter "entangled in a constitutional claim." *Manual Enterprises, Inc. v. Day*. Whether the issue is one of fact or of mixed fact and law, the issue must in the first instance be presented to the trier of the fact. The determination of who that trier of fact shall be is not dependent upon the ultimate right of a trial judge, or appellate court, to set aside the verdict of the trier upon legal or constitutional grounds. See, *Commonwealth v. Moniz*, 336 Mass. 178, 143 N. E. 2d 196 (1957); 338 Mass. 442, 155 N. E. 2d 762 (1959). If a jury trial is constitutionally required in obscenity proceedings, it is immaterial that in particular cases a jury verdict may be set aside or reversed by trial judges or appellate courts. To hold otherwise would jeopardize the right to a jury trial in virtually all cases.

II.

The Statute, on Its Face and as Construed and Applied, Violates the Provisions of the First, Fourth and Fourteenth Amendments. Appellee's Argument That the Procedure Followed in This Case Is a Valid Method of Preventing the Distribution of Obscenity Is Without Basis in Law or in Fact (Appellee's Brief, 23-27).

Appellee makes very little effort to support the constitutional validity of the statute on its face, and as construed. See, Appellants' Brief, 41-47. Appellee states that its problem was "to follow the course marked off" by *Kingsley Books, Inc.* and to avoid the "pitfalls" of *Marcus*, Appellee's Brief, 23. It is submitted that appellee has done neither.

Did the magistrate read the material before issuing the search warrant here? Appellee states that the judge "scrutinized" seven of the thirty-one titles which were finally seized. Obviously, the judge did not read the seven titles in their entirety, but appellee relies on the use of the word "scrutiny" in the *Marcus* decision. Appellee's Brief, 24. Appellants submit that such grasp of a word out of the context of the *Marcus* decision is not sufficient support for its position.

Appellee states that the seven titles were in the judge's possession for three hours prior to the 45-minute hearing. That, however, is not the issue. Did the magistrate *read* the books in their entirety in order to determine the dominant theme of each of the books taken

as a whole? The record is very clear that he did not [R. 3, 19-20, 24].

Having "scrutinized" seven titles, the appellee insists that the magistrate was justified in issuing a warrant to seize all books issued by the same publisher. It is argued that the examining magistrate had "no reason to suspect that there might be a literary gem amongst this utterly crude ore" (Appellee's Brief, 25), and therefore, if the judge could reasonably infer that the books before him were "obscene, these others were probably also obscene" (Appellee's Brief, 24). Statements of this kind, it is submitted, are their own best refutation. See, Appellants' Brief, 48-49.

Other arguments presented by appellee on this issue are equally invalid. The procedures employed here clearly do not meet the standards enunciated in *Kingsley* and *Marcus*. Appellee appears to believe that these decisions authorize the use of contempt and seizure sanctions "to prevent further publication." Appellee's Brief, 26. Appellee, to say the least, misconceives the language of the decisions, and perhaps more importantly, the language of the applicable provisions of the Constitution.

III.

The Local Community of Junction City, Kansas Was Not an Appropriate Geographical Unit to Measure the Constitutional Protection Afforded the Books Involved Herein. Appellee Disregards the Record Made Below With Its Newly Improvised and Invalid Notion of the Meaning of Contemporary Community Standards (Appellee's Brief, 18-20).

Since appellee asserts that the standards of Junction City, Kansas were not applied, appellants turn to the record. At the opening of the trial, prior to the introduction of the books into evidence, appellee's counsel made the following statement:

" . . . The State proposes to put on no expert witnesses, inasmuch as the test, in our view, set out in the statute involved, to wit, Chapter 186, Session Laws 1961, Section 1, Subsection (b), permits or contemplates no expert witnesses of any kind, but rather contemplates that the Court will apply to a determination of the legal question of obscenity, his knowledge, both of the moral standards of the community and as to whether or not these books, in their impact upon the average citizen of the community, would be legally obscene, as heretofore discussed in this case on argument for motion to quash . . ." [Tr. B. 7, September 14, 1961].

The books having been placed in evidence, the State rested [Tr. B. 11]. On the argument with respect to appellants' demurrer to the evidence, counsel for appellee stated:

" . . . It has been previously stated in argument on motions in this case that the Court is—that the

Judge of this Court, Your Honor, if you please, is a resident of some substantial length of time in this community and is presently and was at all times pertinent to this case a resident of this community. We're speaking of the City of Junction City, or Geary County." [Tr. B. 18].

" . . . We submit that the test as set out in Roth and included by act of our legislature in Chapter 186, Section 1 (b), is a test or standard that requires the Court to make a legal decision; in other words, to apply to these books the knowledge of the Court which it's entitled to do, of the standards of the community in which the Court lives and works, to determine in the Court's mind what is an average person in the community, because the State could never establish this by any stretch of the imagination. . . ." [Tr. B. 20-21].

Following argument, the Court called for a copy of the opinion in *Smith v. California* [Tr. B. 31] and then stated:

"The Court: The Court at this time will rule upon the intervenors' demurrer to the evidence of the State. The Court personally finds himself in complete agreement with the statement of Justice Black in the case cited by the intervenor, but unfortunately the Court does not feel that that is the law as set out in the majority decision, nor does the Court feel that the concurring opinion of Mr.

Frankfurter is controlling in this case, and I believe the case can best be summarized, or this particular motion can best be answered, by Justice Douglas [sic] in that case, who says that the state can rely upon the judge of the trial court as the conscience of the community, and based upon this, the demurrer will be overruled." [Tr. B. 31-32].

When then, the Court in its memorandum decision [R. 16-18] stated that it was using the "operative" test of incitement to "sexual desires", and the effect of the books under this test "on the average person residing in this community" [R. 17], it is submitted that it was Junction City, Kansas which the Court was using as the geographical community, and this too appears to have been the view of the court below with its reference to the "Young G.I.'s" who frequent "Junction City" [R. 41].

Since appellee has not discussed the question as presented on the record, appellants do not repeat here the discussion contained in their Opening Brief. See, Appellants' Brief; 50-54. Appellants do analyze in the Point which follows appellee's concept that "community standards are not an objective fact which the State must prove". Appellee's Brief, 16.

IV.

The Failure of the State to Offer Any Proof That the Books Substantially Exceed Contemporary Community Standards Renders the Statute as Construed and Applied Unconstitutional. The Appellee's Argument Essentially Subverts the Concept of Contemporary Community Standards and Relocates the Determination of the Issue of Obscenity to the Subjective Predilections of the Trier of the Facts (Appellee's Brief, 15-20).

The appellee suggests that the word "community" as it appears in the *Roth* test for judging obscenity does not denote a national standard nor a state standard.

If we follow appellee's logic, it appears first that a trier of the facts in an obscenity proceeding will approach the question of obscenity as a trier of the facts approaches the question of negligence in a negligence action. In a negligence case, the trier of the facts constructs "a hypothetical person to be used as a norm", to wit, a "reasonable prudent man". In obscenity cases, according to appellee, the hypothetical man will be "the man with average community attitudes". Thereupon, "if the material deals with sex in a manner offensive to the representative man, then the trier should find it legally obscene". Appellee's Brief, 15-16.

Aside from the vagueness of this ultimate test devised by appellee, it should be initially noticed that there is much greater possibility of agreement among ordinary people on the issue of negligence as to the care expected of a reasonable man than there is on the literary and psychological problems involved in obscenity proceedings.

How does the trier of fact construct the hypothetical person envisaged by appellee? According to appellee,

the trier consults "his own experience as a member of the community", Appellee's Brief, 16. What does this mean? It means, again according to appellee, that the trier decides from "his experience as a member of the community, what he thinks the average person's response to this material would be". Appellee's Brief, 17-18. What experience does the trier rely on in determining the average person's response to the material? The trier distills all the trier knows "about the attitudes of people of all kinds". Appellee's Brief, 20. Where is such trier's knowledge derived? His knowledge is derived, according to appellee, from the experience the trier has gained "from family, travel, school, military service, mass media and business". Appellee's Brief, 19.

While appellee maintains that it is not urging that the trier under its concept may impose his personal standards, the fact is that this in effect is precisely what appellee is attempting to "construct". The appellee is really urging that the trier should look to his own personal community, to the community where the trier lives and works, and that such personal community should be the community whose standards are to measure the constitutional protection to be afforded all speech and press. Distillation of opinion from such a limited community, largely built by the trier's own predilections, is no more than a reflection of the trier's own subjective opinions.

It is because appellee is unwilling to accept that the "community" in our society far exceeds the community of any single individual, that it so strongly argues against a geographical concept. Moreover, if by community standards, we mean no more than the personal community of the trier of the fact, then it is understandable why appellee argues that no amount of uncon-

tradicted proof that a book does not exceed limits of candor in description of sex in the nation, or even the state or local subdivision thereof, binds the trier of the facts.

But it cannot be the rule, it is respectfully submitted, if the constitutional guarantees of speech and press are to be preserved, that books may be suppressed because they offend the circle in which Judge Fletcher in Junction City, Kansas travels, anymore than if they offend the circles in which twelve individual jurors travel. The "community" is society in general, a population reflecting "many different ethnic and cultural backgrounds". *Manual Enterprises, Inc. v. Day*, 370 U. S.; at 488. That community transcends the personal community of any individual.

The problem of who shall be the decision-maker in any obscenity proceeding is different from the problem of how the decision shall be made. The decision-maker should be a jury for reasons implicit in a self-governing society and because a jury from the community will be a more "sensitive tool" in determining the issue of community toleration. But no jury can possibly know the limits of candor in description of sex contained in literature, newspapers, magazines, and all media of communication and their psychological consequences, or the vast changes in tolerance which are taking place in these areas, without some evidence to enlighten them. To assert that a single individual judge sitting in a courtroom in Junction City, Kansas can be given a book to read and without any further evidence, decide that such book substantially exceeds "contemporary community standards" is to flaunt reality. While appellee may vigorously deny it, its arguments here amount to no more than a plea for a return to the days of *Hicklin*.

V.

The Books Herein Are Not Obscene and Are Entitled to the Protections of the First Amendment. Appellee's Arguments Demonstrate the Dangers to Free Circulation of the Press Under Vague Standards for Judging the Obscenity of Writings (Appellee's Brief, 10-15).

"It was precisely at the time when the development of science and civilisation was leading to the proper estimate of witchcraft that the ferocity of the persecution of witches reached its height. We may say the same to-day about obscenity. The old sex taboos are dissolving. We are beginning to face openly the facts of sex with a degree of intelligence and frankness which even a quarter of a century ago was impossible. That new honesty and sincerity itself stirs up the persecutorial fanaticism of the descendants of the witchfinders."

Havelock Ellis, *The Revaluation of Obscenity in On Life and Sex* (Mentor ed., 1957), 193.

The appellee avows that "Comstockery is dead" (Appellee's Brief, 10), but its argument, it is submitted, fails to prove that it is. Appellee heaps abuse upon the books herein, calling the writings "hard-core pornography", and their circulation "smut peddling", reaching this conclusion by a plain use of the discredited *Hicklin* test and by unsupported allegations obviously intended as a substitute for facts. The uncontradicted testimony of expert witnesses which appear in the record are totally disregarded [R. 28-34], and it is contended that the books in this case "fit the Roth rationale perfectly". Appellee's Brief, 11. But, of course, this was not the view of the Solicitor General in *Roth*.

whose principal concept of hard-core pornography was "large numbers of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts." *Roth v. United States*, October Term, 1956, No. 583, Brief for the United States, 37. We deal here only with books without illustrations.

Perhaps the most revealing statement in appellee's brief is the following: "There is no kinship here with the erotica written by Lawrence, Joyce, O'Hara, Miller, or even Wallace or Metalious". It appears, therefore, that *Lady Chatterley's Lover* by D. H. Lawrence, *Ulysses* by James Joyce, *Ten North Frederick* and *A Rage to Live* by John O'Hara, *Tropic of Cancer* and *Tropic of Capricorn* by Henry Miller, *The Chapman Report* by Irving Wallace and *Peyton Place* by Grace Metalious are all constitutionally protected material. Appellee implicitly concedes that these books are neither obscene nor hard-core pornography. Yet these books in their constant use of four-letter and scatalogical words and vernacular, describing sexual organs and activities; in their frank and continuous discussions and clinical presentations of sex relations; in their presentation of themes of lesbianism, homosexuality, cunnilingus, fellatio, sadism, masochism and rape exceed in candor the descriptions and representations of sex contained in the books herein.

The reasons therefore for appellee's attack upon the books herein is that they are not as well written as the aforesaid writings (in some cases, even this may be doubted); that a broad segment of the population may understand these books while they may not appre-

ciate the more literate style of the aforementioned writers; and that if the books of Lawrence, Joyce, Miller, *et al.*, arouse "sexual desires", at least only the literate will be so affected, not the "average" man and woman.

Appellants submit that appellee's arguments reflect a regrettable lack of faith in the sound judgment and hardihood of the people generally. In an era when problems relating to sex in all its manifold manifestations are so frankly discussed in the Kinsey Reports, in marriage manuals, on television, in the theatre, in advertising, in novels, in every conceivable media of communication, it is simply irrational to assert that the common man or woman may not read some particular book which offends the State. In *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, 438, Judge Clark said of Lawrence's *Lady Chatterley's Lover*:

"In actuality his thesis here is only that pressed continuously in the modern marriage—counseling and doctors' books written with apparently quite worthy objectives and advertised steadily in our most sober journals and magazines."

See also, *The Kama Sutra of Vatsyayana* (E.P. Dutton & Co., 1962); *The Perfumed Garden of the Shaykh Nefzawi* (G.P. Putnam's Sons, 1964); *Li Yü, Lou Pu Tuan* (Grove Press, Inc., 1963). On the value of open discussion of sex relations, see the trial of Dr. Eustace Chesser for his publication of the book *Love Without Fear* in Craig, *Suppressed Books* (1963) 97-103.

Appellee asserts that the books herein "nourish erotic fantasies in the reader's mind", that the books are marked by "a daydream quality" which, it is alleged, is a chief characteristic of "obscenity" and "pornography".

But appellee never offered proof to support these assertions in the trial, and the uncontradicted testimony given by expert witnesses [R. 28-34] shows that each of the books contains a plot and theme, and in some cases a very obvious moral, and that none of the books exceed in candor of language or description of sex the novels found in the library in Junction City and elsewhere [R. 26-28]. Daydreams and erotic fantasies arise in the world under a wide variety of circumstances. If such dreams and fantasies are to be removed, it is probably the world which will have to be effaced.

Conclusion.

Appellee, it is submitted, has failed to justify the suppression of the books herein. Appellee's arguments, however, do point to the need for reconsideration of the legal standards affecting the circulation of books dealing with sex. Appellee's arguments fortify the view that books which deal with sex should have the same rights as all other books enjoy under the First and Fourteenth Amendments to the Constitution of the United States: Appellants' Brief, 64-72.

Respectfully submitted,

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